reminders sent in February and March 1978 again brought no response.

The appellant's defence was that her obligation ran from 1963 when the title was registered in her name and the respondent's action was statute-barred, as it was only commenced in 1978, after 12 years had lapsed.

There were also before the court the agreement of sale and correspondence and their translations relating to the transactions (pages 19 to 29 in the record of appeal).

The learned trial judge after hearing the arguments found for the respondent. His reasons may be put briefly thus: The appellant did not deny specifically that she had received a letter from the respondent asking that the land be transferred to the respondent and that by the appellant's reply to that letter, through her solicitor, she expressed willingness to execute the transfer. The material parts of the reply dated June 14, 1978 read:

"'Y. M. Tengku' (the appellant) 'has stressed that she never had the slightest intention of committing breach of the Agreement drawn in respect of the sale of the land to you' (the respondent). 'Although this had happened long ago, the honourable Tengku still complies with the agreement executed in respect of the above land."

By this, the learned trial judge found that there was an acknowledgment by the appellant, which under section 26(1) of the Limitation Ordinance, 1953 had the effect of running afresh the limitation period from the date of acknowledgment.

The learned trial judge seemed to be of the view that nothing turned on the submission of respondent's counsel that the respondent was in possession of the land and had built 2 or 3 houses on the land, as the facts were not adduced in evidence and not even pleaded. But we are of the view the fact of possession could be inferred from the respondent's action, which is for execution of a transfer and not for recovery of land. Indeed before us, counsel for the appellant conceded that the respondent had gone into occupation of the land even before the payment of $450 and the execution of the agreement of sale in 1951, and that the respondent had built three houses on the land. In view of this, we do not consider it necessary to relate this case to the question of acknowledgment or more particularly, to deal with the question whether in the circumstances of this case an acknowledgment made after the expiry of the limitation period revives the period. The appellant's side has argued that such acknowledgment does not revive the period.

In our view the respondent's action is not affected by limitation by reason of her having been in possession of the land from the time of purchase, and the present case fits squarely with the principle laid down by Raja Azlan Shah J. (as he then was) in *Munah* v. *Fatimah*[1] where he said:

"The legal position is that there is an ordinary contract for the sale of land, ... Relying on the contract the plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time, it seems to me, that she was the equitable owner of the said land. What is required now is to clothe the equitable estate with a legal title. She therefore seeks the aid of this court. In my opinion she is well entitled to the relief she claims."

In dealing with the contention by the vendor that the action was statute-barred (as in the present case), Raja Azlan Shah J. following his earlier decision in *Kersah La' Usin* v. *Sikin Menan*[2] relied on the English authority, *Williams* v. *Greatrex*[3] where Denning L.J. (as he then was) said at page 36:

"... once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance."

This principle has been adopted by this court in *Othman & Anor.* v. *Mek.*[4]

Order accordingly.

Solicitors: *Syed Ibrahim & Co.; Wan Abd. Muttalib & Co.*

PUBLIC PROSECUTOR v. KOO CHEH YEW & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J., Chang Min Tat F.J. & Syed Othman F.J.) March 24 & July 1, 1980]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1977]

Criminal Law and Procedure — Charge of importing products of South Africa — Goods prohibited from importation — Mens Rea — Denial by accused of knowledge of relevant prohibition — Whether ignorance of law an excuse — Mistake of fact and of law — Publication in Gazette — Presumption — Onus of proof on accused — Penal Code, s. 135(1)(a) and (2).

Customs — Charge of importing products of South Africa — Goods prohibited from importation — Publication in Gazette — Presumption — Customs Act, 1967, s. 135(1)(a) and (2).

In this case the accused persons were charged in the Sessions Court in Penang with being concerned in importing 6 pianos which being the products of South Africa were by law prohibited goods. They were convicted and they appealed to the High Court. In the High Court Arunalandom J. held that on the facts of the case the accused had no guilty mind and he therefore quashed the convictions, ([1978] 1 M.L.J. 141). The Public Prosecutor then applied for a certificate to refer to the Federal Court certain questions of law of public interest. The questions were:—

"(1) In a prosecution against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition does a denial by the accused of knowledge of the relevant prohibition order entitle him to an acquittal?

(2) Is not the denial of knowledge under section 135(2) of the Customs Act, 1967, limited only to denial of knowledge as to the facts and not as to the law concerning prohibited goods?

(3) Is it not sufficient for the prosecution to prove that the goods imported were of the description mentioned in the prohibition order in order to show that such importation was contrary to the prohibition?

(4) In a proceeding against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a

prohibition, if all the circumstances of the case point to an innocent mind of the accused, is the court entitled to take cognisance of this fact before giving the verdict"?

Held, by a majority (Suffian L.P. dissenting): (1) a denial by the accused of knowledge of the relevant prohibition under section 135(1)(a) of the Customs Act, 1967, does not entitle him *simpliciter* to an acquittal. Even if he proves to the satisfaction of the court that he in fact does not know the existence of the prohibition, he is still not entitled to be acquitted unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition;

(2) proof of lack or absence of knowledge, again on a balance of probabilities, that the goods in question are prohibited from importation (e.g. as in this case that the pianos originated from South Africa) may be ground for an acquittal as a mistake of fact, but a denial of the knowledge of the ban, as a matter of law may not be, even if backed by sufficient proof except in the circumstances set out, that is unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition;

(3) it is sufficient for the prosecution to prove that the goods were of the description mentioned in the prohibition in order to show that the importation was contrary to the prohibition. The burden then shifts to the accused to establish on a balance of probabilities that he did not know of the prohibition and could not have reasonably known of the prohibition;

(4) the exception to the rule against ignorance of law as a defence should not be extended beyond the cases where the accused could not possibly have known of the existence of the law he had offended against.

Cases referred to:-

(1) *Lim Boon Hong and Tan Koon Yee* v. *Public Prosecutor* Penang Criminal Appeal No. 34/67 (unreported).
(2) *Frailey* v. *Charlton* [1920] 1 K.B. 147.
(3) *Duport Steel Ltd.* v. *Sirs* [1980] 1 W.L.R. 142.
(4) *R.* v. *Crawshaw* 8 Cox C.C. 375.
(5) *R.* v. *Esop* 7 C & P 456; 173 E.R. 203.
(6) *R.* v. *Barronet and Allain* 1 E & B. 1; 169 E.R. 633.
(7) *R.* v. *Lopez, R.* v. *Salter* Dears & B. 525; 169 E.R. 1105.
(8) *R.* v. *Bailey* R & R 1; 168 E.R. 651.
(9) *Lim Chin Aik* v. *The Queen* [1963] M.L.J. 50.
(10) *Reg.* v. *Tolson* (1889) 23 Q.B.D. 168.
(11) *The King* v. *Thomas Wheat; The King* v. *Marion Stocks* [1921] 2 K.B. 119.
(12) *R.* v. *Turnbull* [1944] N.S.W.S.R. 108.
(13) *Sweet* v. *Parsley* [1969] 2 W.L.R. 470.
(14) *R.* v. *Norfolk County Council* (1891) 60 L.J. Q.B. 379.
(15) *Labour Department* v. *Green* (1973) 1 N.Z.L.R. 412.
(16) *J.M. Allan* v. *Cloke* [1963] 2 W.L.R. 899.
(17) *R.* v. *Carr-Briant* [1943] 2 All E.R. 156.
(18) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.
(19) *Blackpool Corporation* v. *Starr Estate Co. Ltd.* [1922] 1 A.C. 27.

[The following cases were also referred to in argument:- *Roper* v. *Taylor's Central Garages* (1951) 2 T.L.R. 284, 288; *Tan Wang Keng* v. *Public Prosecutor* [1962] M.L.J. 47, 48; *Ong Aik Phow* v. *Rex* [1937] M.L.J. 73; *R.* v. *Cohen* [1951] 1 All E.R. 203; *Public Prosecutor* v. *Chua Yew Eng & Ors.* [1968] 2 M.L.J. 108; *Goh Ah Tin & Ors.* v. *Public Prosecutor* [1970] 1 M.L.J. 173; *Pang Po & Anor.* v. *Public Prosecutor* [1962] M.L.J. 294; *Lim Kim Chai* v. *Public Prosecutor* [1963] M.L.J. 26; *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.]

FEDERAL COURT.

Mohamed Shafee bin Abdullah (Deputy Public Prosecutor) for the applicant.

Lim Ewe Hock, amicus curiae.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the majority judgment of the Court): Koo Cheh Yew, the sole proprietor of World Piano Co. and Koo Chun Woh (for convenience, the appellants) were charged in the Sessions Court in Penang with being concerned in importing 6 pianos which being the products of South Africa were, by law, goods prohibited from importation, and after a trial, convicted and sentenced to the statutory minimum fine of $10,000 each, in default 1 month's imprisonment. The pianos were ordered to be confiscated.

The Senior President noted that the appellants had nowhere concealed the fact that the country of origin of the pianos was South Africa and they had clearly stated this fact in the several documents they had to fill in and submit for the licence to import and the necessary authority under the Exchange Control Act for payment. He considered the offence one of strict statutory liability and he felt himself bound, as indeed he was by the principle of *stare decisis*, by an unreported decision of H.S. Ong J. (as he then was) in *Lim Boon Hong & Tan Koon Yee* v. *Public Prosecutor*[1] that the offence under section 135(1)(a) (under which the appellants in the present case were also charged) was one of strict liability and the prosecution did not need to prove an intention to evade the ban. H.S. Ong J. declined to follow *Frailey* v. *Charlton.*[2]

On appeal to the High Court, F. Arulanandom J. was rather critical of the legalistic approach which he thought H.S. Ong J. adopted, since that approach could result in "the conviction of persons who are in the particular circumstances of a case totally blameless, a situation which would be total anathema to the principles of criminal jurisprudence and the tenets of criminal justice." The innocence of a man is of course not to be determined other then by established principles of law and one of these principles is the proper interpretation of the law as passed by Parliament. Judges have no legislative functions to perform and cannot so interpret statute law so as to conform to what they personally think is the answer to a grave social evil: *Duport Steel Ltd.* v. *Sirs.*[3] The judge conceded that there was "an age-old maxim that ignorance of the law is no defence" and he went on to qualify this maxim by saying that it would be contrary to the principles of justice to convict an innocent person. Here the judge had enunciated two principles of law which by themselves, were perfectly sound but he would seem to say that in a given situation, they might conflict with one another and when they did, the first must, in his view, give way to the second. So, when a man could satisfy a trial court that he was ignorant of a certain law, as for instance, the law against importing goods from a proscribed country, he had no guilty mind for him to be convicted of the offence with which he was charged. The judge did not go so far as to exempt from a person's range of knowledge any and every law. He did think there was a valid distinction between a law so notorious, as for instance (supplied by him) of dealing with offensive weapons and dangerous drugs and a law not so obvious as the ban against certain countries. In the former class of laws, the person charged with possessing etc. must take the consequences of his action

whether he knew the law or not. He ought to know the law. In the latter class, no necessity arose for the residents of a country to acquaint themselves with the laws of the country so that if a resident acted in ignorance of a law of this kind, all he had to do to earn an acquittal for himself was to establish on a balance of probabilities that he had acted if not in innocence, at least in ignorance of the law. That seems to us to be putting an undue strain on the credulity of the trial judge and to take criminal law into the realms of uncertainty. And quite frankly, this is the first distinction of this kind we have come across. The judge did not seem to think that there was any duty cast on the people who reside in the country to acquaint themselves with the law and to act in accordance therewith, or to consider whether this particular law, the ban on importation of goods originating from South Africa was not in fact a deliberate policy of some notoriety of the Government to join in a world-wide movement against the reprehensible apartheid policy of South Africa so that the people of this country if they did not know, ought reasonably to have known. But on the facts of the case, the judge held that the appellants had no guilty mind and he therefore quashed the conviction and ordered the fines to be refunded. He however confirmed the order of forfeiture, though not without regret. He wholly disagreed with H.S. Ong J. that the offence did not require criminal intention or *mens rea* as an essential ingredient of the offence.

The charge was one under section 135(1)(a) of the Customs Act No. 62 of 1967. The full section reads:

"135. (1) Whoever —

(a) is concerned in importing or exporting any uncustomed goods or any prohibited goods contrary to such prohibition whether such uncustomed or prohibited goods be shipped, unshipped, delivered or not; or

(b) ships, unships, delivers or assists or is concerned in the shipping, unshipping or delivery of any uncustomed goods or any prohibited goods contrary to such prohibition; or

(c) illegally removes or withdraws or in any way assists or is concerned in the illegal removal or withdrawal of any goods from any customs control; or

(d) knowingly harbours, keeps conceals or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods; or

(e) is in any way knowingly concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed or prohibited goods with intent to defraud the Government of any duties thereon, or to evade any of the provisions of this Act or to evade any prohibition applicable to such goods; or

(f) being a passenger or other person, is found to have in his baggage or upon his person or otherwise in his possession, after having denied that he has any dutiable or prohibited goods in his baggage or upon his person or otherwise in his possession, any dutiable or prohibited goods; or

(g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty or in evasion or attempt at evasion of any prohibition of import or export;

shall be guilty of an offence and shall, on conviction

(i) in the case of goods included in a class of goods appearing in an order made under sub-section (1) of section 11, be liable for the first offence to a fine of not less than ten times the amount of the customs duty or five thousand dollars, whichever is the lesser amount, and of not more than twenty times the amount of the customs duty or five thousand dollars, whichever is the greater amount, and for a second or any subsequent offence to a fine of not less than ten times the customs duty or five thousand dollars, whichever is the lesser amount, and of not more than forty times the customs duty or ten thousand dollars whichever is the greater amount, or to imprisonment for a term not exceeding two years or to both such fine and imprisonment;
Provided that when the amount of customs duty cannot be ascertained the penalty may amount to a fine not exceeding five thousand dollars; and

(ii) in the case of uncustomed goods, such goods not being dutiable or prohibited, be liable to a fine not exceeding twice the value of the goods or one thousand dollars whichever is the greater amount:

Provided that where the value cannot be ascertained the penalty may amount to a fine not exceeding one thousand dollars.

(iii) in the case of prohibited goods be liable to a fine of not less than ten times the value of the goods or ten thousand dollars, whichever is the lesser amount and of not more than ten times the value of the goods or ten thousand dollars whichever is the greater amount:

Provided that where the value of the goods cannot be ascertained the penalty may amount to a fine not exceeding ten thousand dollars.

(2) In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

From that acquittal no appeal lay to this court but the Public Prosecutor was entitled as of right under section 66(1) Courts of Judicature Act, 1964 to ask for a certificate to refer questions of law to this court for determination, so long as they are questions of law of public interest which have arisen in the course of the appeal. He framed 3 questions:

"(1) In a prosecution against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition does a denial by the accused of knowledge of the relevant prohibition order entitle him to an acquittal?

(2) Is not the denial of knowledge under section 135(2) of the Customs Act, 1967, limited only to denial of knowledge as to the facts and not as to the law concerning prohibited goods?

(3) Is it not sufficient for the prosecution to prove that the goods imported were of the description mentioned in the prohibition order in order to show that such importation was contrary to the prohibition?"

The Public Prosecutor did not seek to upset the acquittal. The judge was bound in law to grant the certificate. He did so but entirely of his own motion, he added a fourth question which he expressed as follows:

"(4) In a proceeding against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition, if all the circumstances of the case point to an innocent mind of the accused, is the court entitled to take cognisance of this fact before giving the verdict?"

The answers to these questions clearly involve the consideration of the proper application of the principle that ignorance of the law is no excuse and, as an extension thereof, whether there are any circumstances wherein it necessarily clashes with the more fundamental principle that no innocent man shall be convicted of an offence.

As a general proposition, it has long been settled law that ignorance of the law will not excuse any per-

son who has the capacity to understand the law from the consequences of any action which transgresses that law: *R.* v. *Crawshaw.*[4] So a foreigner charged in England with an offence committed in that country, though that act would not be an offence in his own country, was not heard to say that he did not know he was doing wrong: *R.* v. *Esop;*[5] *R.* v. *Barronet and Allain.*[6] And the same applies if the offence is committed in an English ship on the high seas, where the law applicable is the law of the domicile of the ship: *R.* v. *Lopez, R.* v. *Salter.*[7]

In our understanding of this maxim, the law therefore implies a duty on the part of a resident if not to acquaint himself with a knowledge of, at least to so conduct himself as to conform at all times and conduct himself legitimately within the laws of the country or he faces the consequences of his action. And we might as well say it here, we are unable to understand how and why a person actively engaged in the importation of goods did not think it a duty he owed at least to himself to find out what the law on importation of goods was and to act accordingly.

Seen in this light, the application of the maxim cannot be anathema to criminal jurisprudence or justice. There is good reason for it. But even then, the strict application of the rule of ignorance has been somewhat tempered by a consideration, where it existed, of a situation where a person could not possibly with reasonable diligence, if he had reasons to put himself on enquiry, know of the existence of an adverse law, prohibition or ban. Where therefore a defendant was indicted for maliciously shooting at a person on the high seas, shortly after the passing of the statute which made the act an offence but before notice of it could possibly reach the place where the offence was committed, the judge held that as he could not have been tried before the act was passed and as he could not have heard of it, he ought to be pardoned: *R.* v. *Bailey.*[8] See any edition of *Archbold's* Criminal Pleading Evidence and Procedure.

A case which may be referred to is *Lim Chin Aik* v. *The Queen*[9] in which the Privy Council held that the appellant Lim was not guilty of the charge of contravening the ban on his entering and remaining in the State of Singapore recently imposed by the Government because he could not possibly have known, not because he did not know, of the existence of this ban. Their Lordships considered the offence required a guilty mind and because the law did not impose on the authorities a duty to publish the ban in the *Gazette* where the ban was in respect of an individual and not a class of persons, the result was that there was "no practical or sensible way" in which Lim could ascertain whether he was a prohibited person or not. Though their Lordships declined to accept that the order of the Government was a legislative act and not an executive or administrative function, the relevance of this case lies, in our opinion, in the enquiry which their Lordships said was necessary to be made whether putting the accused under strict liability would assist in the enforcement of a statute for the regulation for the public welfare of a particular activity. *Per* Lord Evershed M.R. at p. 53:

> "That means that there must be something he (the accused) can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations."

On a consideration of these authorities, we therefore think that the exception to the rule against ignorance of law as a defence should not be extended beyond the cases where the defendant could not possibly have known of the existence of the law he had offended against. An easy example comes to our mind: the case of a foreigner entering this country with a South African piano amongst the articles he would bring in with him.

We find confirmation for our view in section 79 of the Penal Code. This section reads, in its relevant parts:

> "79. Nothing is an offence which is done by any person who... by reason of mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."

But ignorance or mistake of fact may in some cases amount to an excuse on the assumption that the accused acted under an honest and reasonable belief in a state of affairs which if true would have justified the act done. Thus Mrs. Tolson who remarried in the honest and reasonable but mistaken belief that her husband had died previously was held not guilty of the offence of bigamy: *R.* v. *Tolson.*[10] *Tolson's* case was however distinguished in *The King* v. *Thomas Wheat; The King* v. *Marion Stocks*[11] where it was held that it was no defence in law to an indictment for bigamy that the prisoner, at the time of the alleged bigamous marriage, believed, in good faith and on reasonable grounds, that he had been divorced from the first marriage, if in fact he had not been divorced. The judgment of the High Court in Penang referred to a decision of the Australian High Court in *R.* v. *Turnbull*[12] which followed *Tolson's* case and which ruled that a mistake of fact was a possible defence but Arulanandom J. did not say whether in its view the mistake of the appellants was a mistake of law or mistake of fact.

For ourselves we are of the opinion that the mistake as to the ban on importation of goods originating from South Africa is a mistake or ignorance of law and not of fact. The importers of the goods did not make a mistake as to the fact of the origin of the goods but they themselves said they were ignorant of the statutory ban on the importation of goods from South Africa.

Next we have to deal with the question of *mens rea.* There is a sharp difference of opinion in the High Court, H.S. Ong J. ruling that an offence under section 135(1)(a) is one of strict liability in which the prosecution did not have to prove the guilty mind of the accused, while F. Arulanandom J. was of the opinion that *mens rea* was an essential ingredient of the offence. We understand that H.S. Ong J. was not too happy though he conceived it his duty to apply the law as strictly construed and he invited the parties in the case before him to go on reference to the Federal Court but the parties declined. F. Arulanandom J. had no such doubt. He read, in our view correctly, a number of cases in which the courts had

expressed an unwillingness to accept that an offence created by statute should be deprived of this mental element, unless the statute expressly said so. He also referred to *Sweet* v. *Parsley*[13] in which the House of Lords held that when a person is charged with being concerned in the management of premises used for the purpose of smoking cannabis resin, it was essential for the prosecution to prove knowledge on the part of the accused that he knew the premises were used for that unlawful purpose. The decision of the Law Lords was based on the proper construction of the phrase "for the purpose of." But the basic question was whether the law as passed by Parliament had dispensed with the requirements of *mens rea.*

Mr. Lim Ewe Hock whom F. Arulanandom J. expressly asked to appear before us but whom we gladly and gratefully appointed *amicus curiae* contended with his usual persuasion that while the offences in (a), (b) and (c) of section 135(1) omit the word "knowingly," and by contrast, the offences in the other sub-paragraphs of this section are qualified by this word, the proper construction of section 135(1)(a) is that the mental element is a necessary ingredient for every offence under this section. His contention was grounded on the following argument: section 135(1) is drawn from section 186 of the Customs Consolidation Act of 1876, the only difference being the division of the English section into several distinct and separate paragraphs, but this paragraphing had no grammatical significance and the section must be construed as a whole. No authority was produced to support this proposition but it was then contended that the use of the word "knowingly" in some parts qualified all the other parts so that every separate offence under the section required proof of the mental element. He persuaded the High Court to rely on *Frailey* v. *Charlton, supra,* which H.S. Ong J. had previously rejected not because it was, in his view, wrongly decided but because it was not applicable, the charge being different in nature.

The charge in *Frailey* v. *Charlton, supra,* was the offence under section 186 of "knowingly harbouring prohibited goods" (the equivalent of our section 135(1)(d)) and a strong Court of Appeal decided that the prosecution must prove that the defendant harboured the goods with intent to evade the prohibition. Where the charge specified knowledge, the mental element of intent must clearly be an essential ingredient of the offence. *Frailey* v. *Charlton* is therefore of relevance if on a proper construction, the charge under section 135(1)(a) requires *mens rea.* And we bear in mind that as a matter of construction, the absence of the word "knowingly" in section 135(1)(c) does not by itself indicate strict liability: see the judgment of the Privy Council in *Lim Chin Aik* v. *R., supra* at p. 52.

But for ourselves we do not consider, in the context of section 135 in its entirety that there is any real materiality in the question whether *mens rea* is or is not an essential element in an offence under section 135(1)(a) thereof. If the proper construction be that it is not, it becomes a matter of strict liability and *Frailey* v. *Charlton* would have no relevance. On any other view, then having regard to the fact that the prohibition is one "for the regulation for the public welfare of a particular activity", section 135(2), *supra,* which is absent in the English Act and which therefore distinguishes *Frailey* v. *Charlton,* supplies the answer. By its deeming provisions, this subsection relieves the prosecution of the necessity to prove the knowledge of the appellants. It becomes a fact, proved as a matter of law, that the goods, in this instance, were prohibited goods: see the well-known definition of "deemed to be" by Cave J. in *R.* v. *Norfolk County Council.*[14] And in such a case, the doing of the act forbidden by statute supplies *mens rea* and ignorance of the law is no defence: *Labour Department* v. *Green;*[15] *J.M. Allan* v. *Cloke.*[16]

The proper interpretation of statute by the courts requires the application of enacted law. In our view, section 135(2) must be fully considered in the determination of the guilt or otherwise of the appellants. We consider that this subsection is in amplification and not in derogation of the publication in the *Gazette.* In the ordinary law, this publication (which is common ground) not merely affords the public in general and the appellants in particular "a practical and sensible way" in which they could ascertain the ban on importation of goods originating from South Africa, but also constitutes sufficient notice of the ban: section 18(2) Interpretation Act, 1967 (Rep. 1973). And this rule as to notice by publication is to our mind reinforced by section 135(2), so that we do not accept with respect the suggestion that the principle of *expressio unius exclusio alterius* applies. Whereas ordinarily the law presumes that the notice of the public has been sufficiently drawn to the ban by publication in the *Gazette,* section 135(2) now establishes more positively and as a fact that this ban is to the knowledge of the appellants.

That is, until the contrary is proved, as provided in section 135(2). Now, at first sight, this contrary proof if it includes proof, on a balance of probabilities (*R.* v. *Carr-Briant*[17] and *P.P.* v. *Yuvaraj*[18] at pp. 91-2) of a mere fact of ignorance must appear antithetical to the imputation of knowledge in the first part of this subsection. Knowledge as a fact is a state of the mind and is of a somewhat different character from a fact which is a state of things. Where the law presumes a fact to arise from certain facts or deems it to be so, then we can see that proof may be adduced to rebut that fact which the law presumes. But in the case of knowledge which is imputed to any person, we cannot, with respect, see how it can be said to have been rebutted because that person did not acquire or had not acquired that knowledge. In this sense, the provision for proof to the contrary must appear to be at variance with the knowledge imputed. But *ut res magis valeat quam pereat,* it seems to us that the interpretation to give effect to the whole of this subsection is that the law requires the proof to the contrary to be of circumstances from which it is reasonable to infer or conclude, on a balance of probabilities, that the accused could not possibly have known or acquired that knowledge which the law imputes to him.

In other words, if the law fixes the public with knowledge and deems the knowledge to be a fact and

if as we have postulated, common sense and ordinary prudence and public policy require that every individual should so conduct himself as to keep at all times within the law, then we therefore cannot and do not consider that proof of this lack of knowledge which is acceptable to the trial court is sufficient to discharge the burden on the accused on a charge under section 135(1)(a) even on a balance of probabilities, unless in circumstances which establish that he could not, despite the publication in the *Gazette*, possibly know or be expected to know. Any other interpretation would make inroads into the maxim that ignorance of the law excuses nobody, which would be unjustified.

The answers to the questions are now apparent. They cannot be a simple yes or no. They are complex. In answer to the first question: a denial by the accused of knowledge of the relevant prohibition under section 135(1)(a) does not entitle him, *simpliciter*, to an acquittal. Even if he proves to the satisfaction of the court that he in fact does not know the existence of the prohibition, he is still not entitled to be acquitted unless he proves on a balance of probabilities that he could not have reasonably known of the prohibition. The second question must be answered thus: Proof of lack or absence of knowledge, again on a balance of probabilities, that the goods in question are prohibited from importation, (e.g. as in this case that the pianos originated from South Africa) may be grounds for an acquittal as a mistake of a fact, but a denial of knowledge of the ban, as a matter of law, may not be even if backed by sufficient proof except in the circumstances set out in the answer to question 1. Therefore the denial is not limited to knowledge as to facts and not as to law. The 3rd question can be simply answered in the affirmative. It is sufficient for the prosecution to prove that the goods were of the description mentioned in the prohibition in order to show that the importation was contrary to the prohibition. The burden then shifts to the accused to establish, on a balance of probabilities, a case under the answers to questions 1 and 2. The fourth question has been answered, but strictly, taking cognisance of a fact is not quite the same thing as considering whether the fact, here that of the ignorance of the accused, *simpliciter*, or his innocent mind is sufficient to entitle him to an acquittal.

Suffian L.P. (dissenting): This is a reference under section 66(1) of the Courts of Judicature Act, No. 7 of 1964, by the High Court in Penang on the application of the Public Prosecutor reserving for our decision the following questions of law of public interest:

"In a prosecution against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition, does a denial by the accused of knowledge of the relevant prohibition order entitle him to an acquittal?

Is not the denial of knowledge under section 135(2) of the Customs Act, 1967, limited only to denial of knowledge as to the facts and not as to the law concerning prohibited goods?

Is it not sufficient for the prosecution to prove that the goods imported were the description mentioned in the prohibition order in order to show that such importation was contrary to the prohibition?

In a proceeding against the accused under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to a prohibition, if all their circumstances of the case point to an innocent mind of the accused, is the court entitled to take cognisance of this fact before giving the verdict?"

The facts are not in dispute.

The first accused is the sole proprietor of the World Piano Company which has been selling pianos for over 30 years, and importing them from Germany for seven years. He received a letter from his suppliers in Germany saying that their pianos would be manufactured in South Africa. Ignorant of the existence of Customs (Prohibition of Imports) Order, 1969, published as P.U.(A) 426/1969, which prohibits the importation of goods originating from South Africa, he ordered six; and when they arrived during his absence, his employee, the second accused, prepared two Customs Import Declarations to import them. The country of origin of the pianos was openly stated in the declarations to be South Africa. Customs Officers collected the duty payable on them and released them. Subsequently they realized that the importation was prohibited, seized the pianos and charged the respondents with being concerned with importing prohibited goods contrary to the prohibition, an offence under section 135(1)(a) of the Customs Act 62 of 1967.

The learned President convicted both accused, as he felt bound by an unreported decision of H.S. Ong J. in *Lim Boon Hong & Anor.* v. *Public Prosecutor*,[1] referred to later.

On appeal Arulanandom J. allowed the appeal, and set aside the conviction.

On application by the Public Prosecutor the learned judge referred the four questions for our decision.

All the documents produced by the prosecution in respect of the importation show that the accused did not in any way conceal the fact that the country of origin of the pianos was South Africa. The Certificate of Origin openly states so, and so do the invoices, the bill of lading, the marine insurance policy and the accused's application for foreign exchange under the Foreign Exchange Ordinance. As already stated, the Customs Declarations also made this clear.

The question whether or not the accused were guilty thus becomes purely a matter of law, turning on the interpretation of section 135 of the Customs Act No. 62 of 1967.

That section reads:

"135. (1) Whoever —

(a) is concerned in importing or exporting any uncustomed goods or any prohibited goods contrary to such prohibition whether such uncustomed or prohibited goods be shipped, delivered or not; or

(b) ships, unships, delivers or assists or is concerned in the shipping, uncustomed goods or any prohibited goods contrary to such prohibition; or

(c) illegally removes or withdraws or in any way assists or is concerned in the illegal removal or withdrawal of any goods from any customs control;

(d) knowingly harbours, keeps, conceals or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods; or

(e) is in any way knowingly concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed

or prohibited goods with intent to defraud the Government of any duties thereon, or to evade any of the provisions of this Act or to evade any prohibition applicable to such goods; or

(f) being a passenger or other person, is found to have in his baggage or upon his person or otherwise in his possession, after having denied that he has any dutiable or prohibited goods in his baggage or upon his person or otherwise in his possession, any dutiable or prohibited goods; or

(g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty or in evasion or attempt at evasion of any prohibition of import or export;

shall be guilty of an offence...."

(2) In any prosecution under this section ... any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

The learned judge is of the view that *mens rea* is a necessary ingredient of the offence under paragraph (a) of subsection (1) and that it has two elements: (1) a mind, and (2) a mind which is guilty; that once the prosecution has proved that the accused were concerned in importing prohibited goods, i.e. the "mind" part of intention, a *prima facie* case has been made out against them; but that once the accused have submitted their defence (that they did not know of the prohibition), then the President should have considered on a balance of probabilities whether the accused had in importing the pianos a "mind which was guilty"; and that by their open conduct the accused have proved that it was more probable than not that they were unaware of the prohibition and therefore not guilty. The second judge says that if the principle of "innocent minds" is cast aside, it could even be argued that Exchange Control and Customs had abetted the offence; an approach which, he says, would make a mockery of law and justice.

Mr. Lim, who appears as *amicus curiae*, argues that as our section 135 is modelled on section 186 of the English Customs Consolidation Act, 1876, we should follow the decision of the English Divisional Court, which was a very strong Bench consisting of the Earl of Reading C.J., Darling J. and Avory J., in *Frailey* v. *Charlton*,[2] which held that to constitute the offence of "knowingly harbouring prohibited goods" under the English section 186, it is not enough that the party charged has such goods in his possession with intent to convey them out of the United Kingdom, but that he must have done so "with intent to evade the prohibition". There the respondent, a ship's steward, had on board his ship while lying in the Thames preparatory to departing for a foreign port a quantity of soap, which was intended for the use of passengers on the voyage. The export of soap was prohibited by Royal Proclamation, but the respondent was not aware of the fact of that prohibition. It was held that his ignorance of the prohibition afforded a good defence. The relevant part of section 186 read:

"Every person who shall import or bring or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted contrary to such prohibition or restriction whether the same be unshipped or not; or shall unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited ... or shall knowingly harbour, keep or conceal or knowingly permit or suffer or cause or procure to be harboured, kept or concealed any prohibited, restricted or uncustomed goods ... or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying, removing, depositing, concealing or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or applicable to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs or of the laws and restrictions of the Customs relating to the importation, unshipping, landing and delivery of goods or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods including the duty payable thereon or one hundred pounds at the election of the Commissioners of Customs."

The Earl of Reading C.J. said at page 152 that, assuming that the respondent intended to export the soap, he could not be convicted of an offence under section 186, having regard to the finding that he had no intent to evade the prohibition. He said:

"Section 186 is one of a series of sections beginning with section 169, which were designed for the prevention of smuggling.... Now I cannot read section 186, more especially when I find it ... in a group of sections for the prevention of smuggling, without coming to the conclusion that an offence is not committed under it unless the act complained of is done with intent to defraud the revenue of customs duties or to evade a prohibition against export as the case may be."

Accordingly, Mr. Lim argues that under paragraph (a) of subsection (1) of our section 135 too, no offence is committed unless there was an intent to defraud Government of duty or to evade any prohibition applicable to the pianos.

With respect I do not agree. I am of the opinion that to constitute an offence under paragraph (a) the prosecution need prove only the following elements:

(1) the accused is concerned in importing

(2) goods, the import of which is prohibited;

(3) the importation is contrary to the prohibition; and

(4) the accused knew that importation of the goods was prohibited — as to which, by virtue of subsection (2) of the section, the presumption is that the accused did know, a presumption that is rebuttable by him.

With respect I think that, as subsection (1) of our section 135 is divided into separately-lettered paragraphs, in contrast to the solid arrangement of the words in the English section 186, each of our paragraphs creates a separate offence; that the elements of each offence are to be found solely in the paragraph creating the offence; that "intent to defraud the Government of any duties thereon, ... or to evade any prohibition applicable to such goods" applies only to the offence created by paragraph (e) in which those words occur; and that "fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export" is an element only of the offence created by paragraph (g) in which those words occur. In my opinion, such elements are not required in charges under paragraph (a).

In this respect I agree with H.S. Ong J. in the unreported case already referred to, where he said, after discussing *Frailey* v. *Charlton*:

"I feel I must however follow the trend in our own courts

.. where when proof of *mens rea* or knowledge is essential to a conviction this is specifically stated in the section or paragraph. I am not entitled to construe the legislation other than as it has been enacted in the absence of ambiguity, and accordingly, I hold that under section 135(1)(a) an intent to defraud the Government of any duties thereon, or to evade any of the provisions of this Ordinance or to evade any prohibition applicable to such goods is *not* required."

Does this mean that paragraph (a) does not require *mens rea* at all, so that the accused is guilty even if he did not know of the prohibition?

At first sight that would appear to be so far two reasons. First, it is the law that the importation of pianos originating in South Africa is prohibited and ignorance of the law is no excuse.

Secondly, section 18 of the Interpretation Act No. 23 of 1967, provides:

"(1) The *Gazette* shall be published as follows:

....

(b) a part which shall be known as the Legislative Supplement A... which shall contain all... orders [like the Prohibition Order here]...;

(2) Publication in the official *Gazette* of the Federation shall constitute sufficient notice of any matter required to be published in the *Gazette* by or under any federal law...."

and the order prohibiting the import of goods originating from South Africa was published in the Federal *Gazette* and such publication was therefore sufficient notice of the prohibition — it is, however, sufficient notice only under the Interpretation Act. In my opinion that Act is not sufficient to fix inflexibly persons such as the accused with knowledge of the prohibition. I so think because the Interpretation Act is a general provision, and a general provision does not override an earlier special provision without any indication of a particular intention to do so: *generalia specialibus non derogant.* In *Blackpool Corporation* v. *Starr Estate Co. Ltd.*,[19] Viscount Haldane said at page 34:

"... Wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general rule, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is declared."

See also *Maxwell* on "Interpretation of Statute", 12th edition, page 196 onwards, and *Craies* on "Statute Law", 7th edition, page 377 onwards.

Subsection (2) of section 135 originally appeared as subsection (2) of section 131 of the Customs Ordinance enacted earlier — 15 years earlier — than section 18 of the Interpretation Act. It deals specifically with presumptions where a person is charged with an offence of being concerned in importing prohibited goods. It provides that the prohibited goods, shall be deemed to be prohibited to his knowledge. It goes further: It says that they shall be deemed to be prohibited goods to his knowledge — unless the contrary be proved by him. These words clearly show, in my view, that knowledge both of the law prohibiting the importation of goods such as these pianos and of the fact that these pianos originated from South Africa, is an essential element — for, from the words "unless the contrary be proved by such defendant" it is clear that if he proves the contrary (on a balance of probabilities) he shall not be guilty. So his ignorance of the law *is* an excuse.

None of the cases cited to us deal with a provision similar to our subsection (2) of section 135, and so cannot, in my view, be relied on for arriving at the construction to be placed on our section 135.

With respect I do not agree with Encik Shafee's argument that subsection (2) of section 135 applies only to offences created by subsection (1) where knowledge is an essential element, such as offences under paragraphs (d), (e) and (g), all of which expressly use the word "knowingly", and that it does not apply to offences under paragraph (a) which, he contends, are offences of strict liability. In my view, subsection (2) applies to the *whole* of subsection (1), including offences created by paragraph (a) thereof, and knowledge of the prohibition is an essential element in such offences.

For the above reasons, I would have answered the questions posed as follows:

Question 1. In a prosecution under section 135(1)(a) of the Customs Act, 1967, of being concerned in importing prohibited goods contrary to the prohibition, a mere denial by the accused of knowledge of the prohibition order will not entitle him to an acquittal, but his denial will if the evidence on his behalf shows that more probably than not he was unaware of the prohibition.

Question 3. If the prosecution proves that the goods imported were goods described in the prohibition order, there then arises under subsection (2) of section 135 a presumption that the goods were prohibited to the knowledge of the accused — unless the contrary be proved by him (that is, he may rebut the presumption).

Question 4. If the circumstances of the case point to an innocent mind of the accused, the court is entitled to take cognisance of this fact before giving its verdict.

Question 2 may be answered as follows. Denial of knowledge is not limited only to knowledge as to the facts but extends to knowledge as to the law concerning prohibited goods. Thus, an accused may not only deny knowledge that these pianos were made in South Africa, he may also deny knowledge of the prohibition order.

Answered accordingly.